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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM — 1963

No. 336

MRS. WANDA MERCER,
Petitioner,

versus

PARIS THERIOT,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF ON BEHALF OF RESPONDENT

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STATEMENT OF THE CASE

This is a diversity suit grounded on Louisiana's Wrongful Death Statute*. Petitioner is the re-married widow of

*Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it; the right of this action shall survive in case of death in favor of the children, . . . or spouse of the deceased, or either of them, . . . for the space of one year from the death.

Willie Byrd Mercer, who was fatally injured on December 18, 1955. Mercer's body was found alongside Louisiana Highway No. 1, at a point near Grand Isle, Louisiana, on the morning of December 19, 1955.

Alleging that respondent negligently ran into and fatally injured petitioner's decedent, petitioner filed this suit in United States District Court. Jurisdiction rests on the diversity of citizenship between petitioner, a citizen of the State of Mississippi, and respondent, a citizen of the State of Louisiana. The case was tried by jury and there was a verdict for petitioner in the sum of $25,000.00. Respondent timely moved for directed verdict and, after the verdict had been returned respondent renewed his motion and coupled with it a motion for a new trial. The motions were refused and respondent appealed to the United States Circuit Court of Appeals for the Fifth Circuit. On that appeal, which is herein referred to as the first appeal, the judgment of the District Court was reversed and the case remanded with directions (infra p. 10), 262 F.2d 754, certiorari denied, 260 U.S. 914. In accordance with the mandate of the Court of Appeals, a motion for a new trial was filed by petitioner and, after hearing and re-hearing, the motion was denied. Petitioner appealed and the District Court's refusal to grant her a new trial was affirmed by the Court of Appeals sitting en banc with four of the nine judges dissenting (316 F.2d 635).

STATUTES INVOLVED

1. United States Constitution, Amendment VII.

2. Federal Rules of Civil Procedure, Rules 30, 50 and 59.

3. Louisiana Revised Civil Code Article 2315.

4. 28 United States Code 2106.

THE FACTS

Respondent was in the automobile business and on Sunday, December 18, 1955, had gone to Grand Isle, Louisiana for the purpose of selling an automobile to one Leo Terrebonne (R. 35, 37). After concluding his business with Leo Terrebonne, who was a co-owner of the Fisherman's Restaurant & Bar in Grand Isle, respondent spent the afternoon with friends and having drinks (R. 38, 40). He left Grand Isle between 7:30 and 7:45 in the evening to return to his home in Golden Meadow (R. 41). He denies having any accident while enroute from Grand Isle to Golden Meadow (R. 41).

Petitioner's decedent, Mercer, worked on an oil rig in the Gulf of Mexico and usually returned to shore between 6:00 and 6:30 in the afternoon. He lived in a trailer camp about four miles from the landing which adjoined a bar and grocery and usually rode from the landing to his temporary residence with his foreman, Miller (R. 108-110). Mercer arrived at the landing on Sunday, December 18, 1955 and spoke to Miller in Harry's Bar (R. 111). That was

the last time he was seen alive by any witness. His body was found at approximately 6:30 in the morning of December 19, 1955 alongside Louisiana Highway No. 1, as aforesaid (R. 26; plaintiff's exhibit #1). There was no witness to any accident sustained by Mercer.

ARGUMENT

MAY IT PLEASE THE COURT:

In her brief, petitioner designates four questions presented to this Court and, for the convenience of the Court, respondent will discuss each question so raised in the order listed in petitioner's brief.

Whether the United States Court of Appeals for the Fifth Circuit Can Reexamine Facts Found By A Jury and Substitute Its Findings For Those of the Jury

The statement is misleading. The Court of Appeals in this case did not reexamine facts found by the jury and even a cursory reading of the opinion of the Court of Appeals in the first appeal (262 F.2d 754) reveals that the Appellate Court did not substitute its own findings of fact for those of the jury but examined the record in order to discharge its constitutional and statutory duty of ascertaining whether there was (1) evidence sufficient to support the verdict and (2) reversible error as respondent contended in his brief and assignment of errors. The constitutional right of the Court of Appeals to perform the functions imposed upon it by 28 United States Code 2106 cannot be seriously questioned and the cases cited by petitioner (Petitioner's

Brief 10-12) do not support the contention. To the contrary are Galloway v. United States, 319 U.S. 372, 63 S. Ct. 1077; Slocum v. New York Life Insurance Company, 228 U.S. 364, 33 S. Ct. 523; Moore v. Chesapeake & Ohio Railway Company, 340 U.S. 573, 71 S. Ct. 428.

The scope of review of the Court of Appeals on the first appeal was a determination, as aforesaid, of the sufficiency of the evidence to discharge the burden of proof resting upon her. In the instant case the burden of proof which petitioner must discharge is actionable negligence which proximately contributed to decedent's fatal injuries.

Under Louisiana law negligence is never presumed. It must be established by a preponderance of the evidence and judgments must be based on evidence, not suspicious circumstances or speculation. The basis of liability is fault. Jones v. Texas and Pacific Railway Company, 125 La. 542, 51 So. 582; Lange v. Illinois Central Railroad Company, 107 La. 687, 31 So. 1003; Larkin v. State Farm Mutual Automobile Ins. Co., 233 La. 544, 97 So. 2d 389; Evans v. Campbell, 9 So. 2d 91; Cali v. Cloverland Dairy Products Company, 21 So. 2d 166; Lowery v. Ashworth, 28 So. 2d 774.

Not only is there no evidence in the record that respondent drove his automobile into and against the person of petitioner's decedent, but there is not one word in the record to support the conclusion that respondent was negligent and that any such negligence proximately contributed to the injuries to and death of Willie Mercer.

Whether the United States Court of Appeals for the Fifth Circuit is Empowered to Withhold a Cause From the Jury When Evidence Has Been Presented From Which Reasonable Men Could Draw Different Conclusions and Inferences

The statement begs the question. On the first appeal of the instant case the Court of Appeals found that there was not sufficient evidence to support the jury verdict, consequently, that there was no evidence presented from which reasonable men could draw different conclusions and inferences. Theriot v. Mercer, 262 F.2d 754. This is not a situation wherein the Court of Appeals found facts contrary to those found by the jury but is like Galloway v. United States, supra, wherein the Court of Appeals found, as matter of law, that there was no competent evidence upon which the jury verdict could rest.

More pertinent to the present situation are the following circumstances. At the close of the evidence in this case respondent moved the District Court for a directed verdict in accordance with Rule 50(a) of the Federal Rules of Civil Procedure (R. 165). The district judge denied the motion (R. 166). After the verdict and within the time allowed by Rule 50(b), respondent filed motion for judgment notwithstanding the verdict and alternatively for a new trial under Rule 59 (R. 193). The motions were submitted to the District Court and that court denied the motions with reasons (R. 197). In the Court of Appeals respondent assigned as error the refusal of the District Court to grant judgment notwithstanding the verdict or a new trial.

A similar situation was presented in Montgomery Ward & Company v. Duncan, 311 U.S. 243, 61 S. Ct. 189, wherein it was held:

> "If alternative prayers or motions are presented, as here, we hold that the trial judge should rule on the motion for judgment. Whatever his ruling thereon he should also rule on the motion for a new trial, indicating the grounds of his decision. If he denies a judgment n. o. v. and also denies a new trial, the judgment on the verdict stands and the losing party may appeal from the judgment entered upon it, assigning as error both the refusal of judgment n. o. v. and errors of law in the trial, as heretofore. The Appellate Court may reverse the former action and itself enter judgment n. o. v. or it may reverse and remand for a new trial for errors of law." 311 U.S. 253, 254.

Respondent does not suggest that the Court of Appeals in this case could have itself entered judgment n. o. v. or directed the District Court to do so. Such is not permitted in cases wherein the Court of Appeals reverses for insufficiency of the evidence. Slocum v. New York Life Insurance Company, supra. However, the Court of Appeals did not withdraw the case from the jury but, on the contrary, employed the most expeditious manner of permitting determination of whether petitioner could produce competent evidence which would justify submission of her case to the jury.

Whether Or Not Evidence Presented By Petitioner Was Incompetent

Whether the evidence submitted to the jury is sufficient to support a verdict in any case depends on the circumstances of the particular case. Among those circumstances must be the nature of the case, the burden of proof which must be discharged and, of course, the quality of the evidence offered. In the first appeal herein, the Court of Appeals applied Louisiana law to the extent that the State law is applicable. As has been heretofore stated, the basis of liability in this case is fault on the part of respondent and the term "fault" is synonymous with negligence. Under Louisiana law negligence is never presumed. To the contrary, the presumption favors respondent and the law presumes that he was not responsible for the injuries to and death of petitioner's decedent until his guilt is proven by a reasonable preponderance of the evidence. Larkin v. State Farm Mutual Automobile Insurance Company, supra. The failure of petitioner to have discharged that burden of proof is shown with particularity by the decision of the Court of Appeals on the first appeal herein and, indeed, even the dissenting opinions in the second appeal herein reflect that the additional evidence proffered by petitioner on her motion for new trial is essential to make out a case which could go to the jury (R. 261 et seq.). Study of the testimony and exhibits shows that there was no witness to any accident sustained by decedent; that the Sheriff's office suspected respondent merely because he had been seen at Grand Isle on the afternoon before decedent's body was found and even before the Sheriff's deputies knew that there was front-end damage to respondent's automobile (R. 58, 87). Plaintiff's evidence consists of speculation on the part of the Sheriff's deputies as to the nature of the material they found on and removed from respondent's automobile. There was no evidence as to the exact nature

of those items but the Sheriff's deputies were permitted to express unlearned opinions as to what those items appeared to be (R. 60, 61, 65, 70, 71, 75, 76, 79, 91, 92, 104).

The additional evidence proffered by respondent in support of her motion for a new trial speaks for itself. It is hearsay referring to hearsay, rumor and speculation, without any supporting evidence that respondent was involved in any accident with plaintiff's decedent or that respondent's automobile struck plaintiff's decedent.

That flight from the scene of an accident indicates probability of guilt presupposes that respondent was involved in any accident from which he fled and there is no proof whatever that respondent's car, which was being driven by respondent himself, struck petitioner's decedent.

In her brief, respondent includes under this heading the ex parte letter addressed to her attorney by Ralph H. Snyder of Oklahoma City, Oklahoma, on May 16, 1959, which appears as an appendix in the Record (R. 263 et seq.). Respondent does not know what the qualifications of Mr. Snyder might be. From an analysis of his letter aforesaid, it is apparent that the author thereof based his opinion in part on the speculative testimony given by the Sheriff's deputies and not on any examination of respondent's automobile, the place whereat decedent was found or an examination of decedent and, even if the report had been offered in evidence on the trial, it would have been inadmissible unless Mr. Snyder was subjected to cross-examination either in court or by deposition. The examination of the record of evidence adduced at the trial by the Court of Appeals on the first appeal and by the entire Court of

Appeals on the second appeal satisfied the majority of the Court of Appeals that neither the evidence adduced on the trial nor the evidence offered in support of petitioner's motion for a new trial constituted probative evidence sufficient to submit the case to the jury. There is no apparent error in the conclusion of the Court of Appeals aforesaid. The conclusion has been reached in light of the burden of proof imposed on petitioner in this case in accordance with State law.

The real constitutional question presented in this case is whether the mandate of the Court of Appeals in the first appeal violates rights guaranteed by the Seventh Amendment to the United States Constitution. Having found that there was no evidence to support the verdict, and having found prejudicial error committed at the trial, the Court of Appeals reversed the judgment and remanded the case to the District Court with directions, as follows:

> "Because, however, evidence, as distinguished from rumor and speculation, as to the why and how of the death of plaintiff's decedent and as to the responsibility of defendant for it, may have been or may be discovered, we order the judgment reversed and the cause remanded with directions to enter a judgment for the defendant unless plaintiff, within a time and under conditions to be fixed by the district judge, makes a satisfactory showing that on another trial evidence of sufficient probative force to justify submission of the cause to the jury will be offered, in which event the judgment shall be for a new trial."

The Seventh Amendment provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

The jurisprudence of this Court is barren of any case directly in point. Resolution of the problem in light of present day practice and the Federal Rules of Civil Procedure suggest the correctness of the mandate. Gasoline Products Co. v. Champlin Ref. Co., 283 U.S. 494, 51 S. Ct. 513.

Being mindful of the decision of this Court in Slocum v. New York Life Insurance Company, supra, wherein Mr. Justice Van Devanter, speaking for the Court said:

> "The adjudicated cases dealing with the origin, scope and effect of the amendment are numerous and so comprehensive that little room for original discussion remains."

respondent will limit his discussion to whether the mandate of the Court of Appeals, aforesaid, violates the provisions of the Seventh Amendment. The dissenting opinion of Mr. Justice Hughes in the Slocum case eloquently expreses respondent's position and, of course, the dissenting opinion aforesaid was written twenty-five years before the adoption by this Court of the Federal Rules of Civil Procedure.

The mandate under consideration took advantage of the tools afforded by the discovery provisions of the Rules, particularly, Rule 30, which provides for Depositions Upon Oral Examination. The mandate directed the District Court to allow petitioner opportunity to make a satisfactory showing that on another trial there might be produced evidence of sufficient probative force to justify submission of the cause to the jury, and relies upon the ruling of law by the district judge as to the legal quality or admissibility of such proffered evidence. The trial judge afforded petitioner wide latitude in procuring the depositions of witnesses, some of whom had testified on the trial, without any limitation and, after careful consideration of the depositions which were filed in support of petitioner's motion for a new trial, and, after twice considering the motion for a new trial, held with stated reluctance that "This evidence, while persuasive, would be inadmissible on a new trial under the hearsay rule." (R. 230-234). Had the district judge granted petitioner's motion for a new trial the evidence offered in support of the motion would have been excluded and, indeed, had a new trial been granted, much of the evidence admitted on the original trial would have been excluded. So the futility of granting petitioner a new trial becomes apparent.

Nowhere in the Constitution is there any prohibition against a Circuit Court reviewing the record of a trial for the purpose of ascertaining whether the verdict is supported by competent evidence. Slocum v. New York Life Insurance Company, supra; Galloway v. United States, supra; Aetna Insurance Company v. Kennedy, 301 U.S. 389, 57 S. Ct. 809. Having discharged that function, the Court of Appeals in this case instead of paying lip service to the

Seventh Amendment and slavishly ordering a new trial, employed the up-to-date legal machinery afforded by the Federal Rules of Civil Procedure and fulfilled the constitutional requirement of giving to petitioner full opportunity to show to the satisfaction of the District Court that on another trial competent evidence would be offered in support of her claims. Petitioner took full advantage of the opportunity and failed to convince the District Court that on another trial evidence of probative value would be so offered. As aforesaid, her motion for new trial was twice heard by the district judge and his ruling was the subject of appeal and review by all nine judges of the Court of Appeals for the Fifth Circuit.

The mandate was not dispositive of petitioner's case as were the mandates in Slocum and in Aetna Insurance Company, which directed the entry of judgment for the appellant in each said case. Here the mandate protected petitioner's constitutional rights and also protected the business of the Courts and the rights of respondent against fruitless use of the Court's time and expenditure of respondent's costs of defending the suit anew.

In Gasoline Products Company v. Champlin Ref. Co., supra, this Court said:

> "It is the Constitution which we are to interpret; and the Constitution is concerned, not with form, but with substance. All of vital significance in trial by jury in that issues of fact be submitted for determination with such instructions and guidance by the court as will afford opportunity for that consideration by the jury which was secured by

> the rules governing trials at common law . . . Beyond this, the Seventh Amendment does not exact the retention of old forms of procedure . . . It does not prohibit the introduction of new methods for ascertaining what facts are in issue . . ." 283 U.S. 494, 498.

All litigation must sooner or later come to an end. The District Court and the Court of Appeals concluded that a new trial would not have availed petitioner the relief she sought, not on factual grounds but on legal grounds.

REVERSIBLE ERROR COMMITTED AT THE TRIAL

Petitioner has not discussed in her brief the holding of the Court of Appeals in the first appeal that there was reversible error committed at the trial without reference to the absence of evidence sufficient to take the case to the jury. Respondent assumes that petitioner concedes that there was reversible error committed on the trial and, since the issue has not been raised by petitioner, respondent does not feel constrained to discuss it here.

CONCLUSION

In the instant case the Court of Appeals performed its function of examining the record for the purposes of determining whether there was evidence sufficient to support the verdict and whether there was reversible error committed on the trial. The Court of Appeals directed the District Court to entertain a motion for a new trial and to permit petitioner full opportunity to show that on a new trial competent evidence would be offered in support of

her case. Petitioner was unable to supply the District Court with such evidence and the motion for a new trial was denied. Petitioner has had full review of the District Court's denial of her motion.

Neither the first appeal nor the second appeal deprived petitioner of her constitutional right to trial by jury since trial by jury presupposes submission to the jury of evidence competent in law and sufficient to make out a case for jury determination.

The judgment below should be affirmed.

Respectfully submitted,

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PROOF OF SERVICE

I, Stanley E. Loeb, attorney for respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that I served a copy of the foregoing brief on H. Alva Brumfield, Esquire, attorney for petitioner, by having mailed a copy thereof, United States postage prepaid, addressed to him at 205 American Bank Building, Baton Rouge, Louisiana, on March , 1964.

Stanley E. Loeb